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No. 91-1936

In The

Supreme Court of the United States

October Term, 1991

SETTOON MARINE, INC.,

Petitioner.

vs.

CAROL J. DOMINGUE, JR.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent would adopt the statement of the case as set forth in the opinion of the United States Court of Appeals for the Fifth Circuit and suggest the same is sufficient and appropriate to correct any misstatements of facts that may be implied from petitioner's brief.

REASONS FOR DENYING THE WRIT

Petitioner has sought review by this Court under Supreme Court Rule 10.1(c) on three separate points.

First, petitioner seeks specific jury instructions and interrogatories on a land based/sea based distinction that is no longer relevant since *Gizoni,*[1] and which instruction was within the discretion of the trial court to deny.

Second, the evidence presented would support even the two pronged conjunctive test suggested by the petitioner albeit *Wilander*[2] sanctions the *Barret/Robison*[3] test. The issue should be considered moot.

Third, the fact specific inquiry referred to in *Wilander*[4] and *Gizoni*[5] is best addressed by the trial court in its jury instructions and in its discretion, after hearing the evidence, through straight forward, simplistic jury interrogatories.

The crux of petitioner's request of this Court is to establish rules that deny Jones Act status to any seaman while the vessel to which he is assigned plies the inland waters of the United States, for reason that during this time he may not be exposed to the perils of the sea.

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1. *Southwest Marine, Inc. v. Gizoni,* ____ U.S. ____, 112 S. Ct. 486 (1991) (hereinafter "*Gizoni*").

2. 498 U.S. ____, 11 S. Ct. 807, 112 L. Ed. 2d 866 (1991) (hereinafter "*Wilander*").

3. *Barret v. Chevron U.S.A., Inc.,* 781 F.2d 1067 (5th Cir. 1986) (en banc) and *Offshore Co. v. Robinson,* 266 F.2d 769 (5th Cir. 1959).

4. *Id.*

5. *Id.*

The sole remaining extraneous issue is that petitioner was denied a jury instruction on the availability of Longshoreman and Harborworkers Act benefits, and this in light of its stipulation at trial that it had paid maintenance and cure and medical expenses since the date of injury. The trial court found it to be irrelevant and potentially confusing to the jury and excluded the same in a proper exercise of its discretion. The statement of respondent counsel followed a lengthy suggestion to the jury that respondent was a seaman and supplementally suggested damages would be awarded or respondent would remain desperate. The statement was not found to be prejudicial such as to support an instruction on every conceivable avenue of relief that might be granted to respondent if damages were not awarded, *i.e.*, LHWCA benefits, social security disability, Louisiana state workers' compensation, welfare. The statement is certainly not so prejudicial as to warrant reversal.

CONCLUSION

The petition for writ of certiorari of Settoon Construction, Inc. should be denied.

Respectfully submitted,

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